



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR  
ATTORNEY GENERAL

**OAG 17-028**

CAPITOL BUILDING, SUITE 118  
700 CAPITOL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

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*Subject:* Whether cities of the home rule class may enact ordinances, setting term limits for the office of mayor.

*Requested by:* Hon. Bryan Traugott, Mayor of the City of Versailles

*Written by:* Sam Flynn

*Syllabus:* Neither the Kentucky Constitution nor general law prohibit cities of the home rule class, except those former cities of the second class, from enacting ordinances setting successive term limits for the office of mayor.

*Statutes construed:* KRS 67C.105, KRS 81.005, KRS 82.082, KRS 83A.024, KRS 83A.040, KRS 83A.045, KRS 83A.047, KRS 83A.050, KRS 83A.130, KRS 83A.150, KRS 83A.170, and KRS 83A.175.

*OAGs cited:* OAG 81-380

***Opinion of the Attorney General***

The Mayor of the City of Versailles, Mr. Bryan Traugott, has requested an opinion of this office as to whether municipalities classified as cities of the "home rule" class may enact ordinances, setting successive term limits on the office of mayor. For the reasons set forth below, we do not believe the Kentucky Constitution nor the general law prohibit cities of the home rule class, except those cities formerly of the second class, from enacting ordinances setting successive term limits for the office of mayor.

As "[m]unicipalities are 'creatures of the law' and 'possess only such powers as the state through its Legislature has expressly or impliedly conferred upon them[.]'" this

inquiry first requires a historical, contextual review of both the constitutional and statutory provisions governing municipalities and mayoral elections. *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W.3d 517, 519 (Ky. 2002) (internal citation omitted).

### ***Background***

Section 156 of the 1891 Kentucky Constitution (repealed in 1994) originally divided cities into six classes, based on population. The election of municipal officers is governed by Section 160 of the current Kentucky Constitution. KY. CONST. § 160. Section 160 originally established that mayors of cities of the first, second, and third classes and members of legislative bodies of all classes of cities are to be elected by the qualified voters of the cities. *Id.* Mayors of cities of the fourth, fifth, or sixth classes may be appointed or elected, as provided by law. *Id.* The terms of mayors were, and continue to be, set at four years. *Id.* Today, as discussed herein, first class cities are the only former classification that remains, along with a recently-created home rule class. See KRS 85.005(1).

Before 1980, Kentucky statutory law placed certain prohibitions on mayors of cities of some classes from succeeding themselves in office.<sup>1</sup> These restrictions were repealed in 1980. See 1980 S.B. 26, Chapter 235 of the Acts, Section 20. The General Assembly enacted the Municipal Code of 1980, which provided no such restrictions on successive terms. See OAG 81-380 (citing KRS 83A.040, 83A.050, and KRS 83A.150).

Prior to 1986, the Kentucky Constitution also expressly prohibited mayors of cities of the first or second class from succeeding themselves in office after serving one term. KY. CONST. § 160. (stating “No mayor or chief executive or fiscal officer of any city of the first and second class, after the expiration of the term of office for which he has been elected under this Constitution, shall be eligible for the succeeding term.”) Interpreting the prior version of Section 160, this office recognized that prohibition, stating: “mayors in first and second-class cities cannot succeed themselves in office.” OAG 81-380.

However, in 1986, Section 160 was amended to allow mayors of cities of the first or second-class to serve three consecutive terms before becoming ineligible for a succeeding term. The Section is silent as to successive term limits for mayors of cities of the third, fourth, fifth, and sixth class. KY. CONST. § 160.

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<sup>1</sup> See e.g., 1964 S.B. 142 (amending KRS 85.230 to limit mayors of cities of the third class to two successive four year terms.) (repealed 1980).

In 1994, the people ratified the local government constitutional amendment, repealing Section 156 of the Kentucky Constitution, and replacing it with Section 156a and Section 156b. Section 156a expressly provided the General Assembly the authority to specify by general law how cities may be classified, other than by population, but did not expressly remove the prior-existing six-class system – leaving in place the six-class system, subject to legislation. Section 156b established the constitutional foundation for the city “home rule” statutes originally enacted as “The Municipal Code of 1980.”

In 2014, in accordance with Section 156a, the General Assembly enacted a new two-level classification system, which became effective on January 1, 2015. *See* 2014 HB 331. House Bill 331, *inter alia*, provided “cities incorporated before January 1, 2015, shall be classified in accordance with the [two] classes” codified at KRS 81.005(1), which include cities of the first class,<sup>2</sup> under KRS 81.005(1)(a), and cities of the home rule class, under KRS 81.005(1)(b). *See* KRS 81.005(2).<sup>3</sup>

As previously discussed, Section 160 of the Kentucky Constitution, as amended in 1986, provides that mayors of cities of the first and second class are constitutionally limited to three successive terms of office. KY. CONST. § 160. House Bill 331 rolled cities of the second class into the new home rule class, the harmonizing the mayoral term limits of Section 160 with House Bill 331 by enacting KRS 83A.024 so as not to render meaningless the constitutional language of Section 160. Pursuant to KRS 83A.024, the Department for Local Government is required to create a registry of cities classified as cities of second class as of August 1, 2014, and mandates that Section 160’s successive mayoral term limits shall apply to those cities formerly of the second class.<sup>4</sup> However, House Bill 331 was silent as to successive mayoral term limits for the remaining four hundred and six Kentucky municipalities formerly classified as cities of the third, fourth, fifth, and sixth classes.

Notably, the Municipal Code of 1980, discussed above, also created the home rule grant - later constitutionally established in 1994 under Section 156b of the Kentucky

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<sup>2</sup> The City of Louisville is the only city of the first class.

<sup>3</sup> Cities of the first class operate under the mayor-alderman governance model. *See* KRS 81.005(1)(a). Cities of the home rule class operate under any of three different government models, including: (1) the city manager plan under KRS 83A.150, (2) the mayor-council plan under KRS 83A.130, or (3) the commission plan under KRS 83A.140. *See* KRS 81.005(1)(b).

<sup>4</sup> Cities classified as cities of the second class, as of August 1, 2014, are as follows: Ashland, Bowling Green, Covington, Frankfort, Henderson, Hopkinsville, Jeffersontown, Lexington, Newport, Owensboro, Paducah, Radcliff, and Richmond. *See Department for Local Government, Historical City Classes*, available at <https://kydlgweb.ky.gov/Entities/cityHome.cfm>.

Constitution. The home rule grant provides "home rule" cities all municipal powers, except those denied by the Constitution or statute, stating:

A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.

KRS 82.082(1).

### *Analysis*

Mayor Traugott's request requires a two-part inquiry under KRS 82.082. First, whether a municipal ordinance placing successive term limits on the office of mayor in a city of the home rule class would conflict with any constitutional provision, and second, whether an ordinance creating successive term limits on the office of mayor in cities of the home rule class would conflict with any statutory provision. At the outset, we note that this opinion is limited in scope to the question of whether a city of the home rule class may, via-ordinance, limit the number of successive terms a person may hold the office of mayor.

While the Kentucky Constitution explicitly limits persons seeking the office of mayor in cities of the first and second class to no more than three successive terms, it is silent as to term limits on mayors in cities of the home rule class. Section 160 confers upon the General Assembly the authority to make laws setting qualifications on mayors.<sup>5</sup> Interpreting the pre-amendment Section 160, the Kentucky Court of Appeals determined, "[w]hen so considered, the words, 'No mayor, after the expiration of the term of office to which he shall have been elected ... shall be eligible for the succeeding term,' evidently refer to a term of four years, and mean that a mayor who is elected to a full term may not be reelected within eight years." *McGinnis v. Cossar*, 18 S.W.2d 213 (Ky. App. 1929). As discussed above, Section 160 of the Kentucky Constitution, as amended in 1986, provides for term limits of three successive terms on mayors of cities of the first class and second class. Accordingly, the 1986 amendment only slightly alters the application of the *McGinnis* court's analysis to render ineligible mayors of cities of the first and second class, who have previously served three successive terms.

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<sup>5</sup> This Office has previously recognized term limits are qualifications on the office of mayor. OAG 81-380 (finding that, prior to its 1980 repeal, KRS 84.280(3) set term limit qualifications for second-class city mayors, rendering them "ineligible" to a successive term.)

In 2014, the General Assembly abolished the old city-classification system, enacting a two-class system pursuant to its authority under KY. CONST. § 156a. As Section 160 was amended in 1986, prior to the enactment of the two-class system, Section 160 is silent as to the term limits of mayors of the relatively new home rule class under KRS 81.005(b), even though cities of the second class were re-classified as home rule cities. KRS 81.005(1)-(2). Notably, no other constitutional provision relating to municipal office holders either mandates, permits, or prohibits term limits of mayors of the home rule class cities. *See* KY. CONST.

The next step in the home rule grant analysis is whether a mayoral term limits ordinance in a city of the home rule class would conflict with statutory law. KRS 82.082(2) sets the statutory definition for such conflicts:

A power or function is in conflict with a statute if it is *expressly prohibited by a statute* or there is *a comprehensive scheme* of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of Chapters 95 and 96.

(Emphasis added.)

Under KRS 82.082(2), the first question is whether a successive term limits ordinance is expressly prohibited by statute. We do not believe any Kentucky statute prohibits successive term limits for mayors of home rule cities, except those cities formerly of the second class. As noted above, this office has expressly recognized term limits as a qualification of office. *See* OAG 81-380. KRS 83A.040(1) provides the election and qualification of mayors of cities of the home rule class. As this office determined in OAG 81-380, KRS 83A.040(1) is silent as to term limits on the office of mayor. Moreover, the General Assembly has clarified that Ky. Const. § 160's successive mayoral term limits apply to mayors of home rule cities that were cities formerly of the second class. *See* KRS 83A.024.<sup>6</sup> Accordingly, this Office finds both KRS 83A.024 and 83A.040(1) devoid of any prohibition of successive mayoral term limits on cities of the home rule class previously classified as cities of the third, fourth, fifth, or sixth class.<sup>7</sup>

The next question under KRS 82.082(2) is whether there is a *comprehensive scheme of legislation*, on the same general subject within Kentucky's statutes. *See* KRS 82.082(2).

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<sup>6</sup> *See also*, KRS 67C.105(2)(c) (prohibiting a mayor of a consolidated local government containing a city of the first class from serving more than three successive terms).

<sup>7</sup> The City of Versailles is such a city, having been classified as a city of the fourth class prior to August 1, 2014.

As discussed below, we do not believe Kentucky's statutes create a comprehensive scheme of legislation on the general subject of term limits for mayors of home rule cities. The Kentucky Supreme Court set forth the test to determine whether a comprehensive scheme of legislation exists in the case *Commonwealth v. Do, Inc.*, 674 S.W.2d 519, 521 (Ky. 1984). A comprehensive scheme exists where, either:

- (1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
- (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or
- (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

*Id.*

Regarding the first factor, KRS 83A.040(1) places certain qualifications on the office of mayor in cities of the home rule class. However, unlike KRS 83A.024, which mandates the successive mayoral term limits of Ky. Const. § 160 on cities previously classified as second class, we do not find KRS 83A.040(1) so "fully and completely covers the subject-matter of qualifications as to become exclusively a matter of state concern." *Do, Inc.*, 674 S.W.2d at 521. To the extent KRS 83A.040 provides qualifications for the office of mayor, it provides, in pertinent part, the following:

- (1) A mayor shall be elected by the voters of each city at a regular election. A candidate for mayor shall be a resident of the city for not less than one (1) year prior to his or her election. His term of office shall begin on the first day of January following his election and shall be for four (4) years and until his successor qualifies. If a person is elected or appointed as mayor in response to a vacancy and serves less than four (4) calendar years, then that period of service shall not be considered for purposes of re-election a term of office. A mayor shall be at least twenty-one (21) years of age, shall be a qualified voter in the city, and shall reside in the city throughout his term of office.

KRS 83A.040(1).

Section 160 states: “[t]he General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled.” *Id.* KRS 83A.040(1) prescribes general qualifications on the office of mayor.<sup>8</sup> However, under the Home Rule grant, the Kentucky Supreme Court has stated “[t]he mere presence of the state in a particular area of the law or regulation will not automatically eliminate local authority to enact appropriate regulations.” *Kentucky Restaurant Assoc. v. Louisville/Jefferson County Metro Gov’t*, 501 S.W.3d 425, 429 (Ky. 2016) (citing *Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t*, 131 S.W. 3d 745, 750 (Ky. 2004)).

Further, the Kentucky Supreme Court has clarified “[i]n order to rise to the level of a comprehensive system or scheme, the General Assembly must establish a definite system that explicitly directs the actions of a city.” *Kentucky Restaurant Assoc. v. Louisville/Jefferson County Metro Gov’t*, 501 S.W.3d 425, 430 (Ky. 2016) (citing *Dannheiser v. City of Henderson*, 4 S.W.3d 542 (Ky. 1999)). Notably, unlike KRS 67C.105(2)(c) for consolidated local governments and cities formerly of the second class under KRS 83A.024, KRS 83A.040(1) does not mandate successive term limits as a qualification for the office of mayor in cities of the new home rule class that were previously classified as third through sixth class. Moreover, this office has previously determined that KRS 83A.040 does not restrict mayors from succeeding themselves in cities of the second-class. *See* OAG 81-380 (finding that Ky. Const. 160 placed term limit restrictions on such mayors). As KRS 83A.040 provides the qualifications for the of mayor in cities of the home rule class, and those qualifications do not include successive term limits in that statute, we do not find KRS 83A.040 fully covers the subject matter of qualifications of the office of mayor in cities of the home rule class.

Next, a comprehensive scheme also exists where the general law is couched in terms indicating that it is a paramount state concern will not tolerate further or additional local action. *Do, Inc.*, 674 S.W.2d at 521. As discussed above, there is no statute restricting the successive term limits on mayors of cities formerly of the third through sixth class. Moreover, The Kentucky Court of Appeals, now Supreme Court, previously upheld city ordinances relating to the election of mayors in other contexts. *Craft v. Baker*, 238 S.W. 389 (Ky. App. 1922). Specifically, the Court upheld the validity of an ordinance of a city of the fourth class, which provided that vacancies in the office of mayor be filled by appointment. *Id.*; *See also, Brown v. Holland* (Ky. App. 1895). Kentucky courts

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<sup>8</sup> In addition, general prohibitions on office holding found elsewhere in the Kentucky Constitution apply. For example, any individual who illegally uses money or property “to procure his election, or influence the vote of any voter,” or has been “convicted of a felony or of such high misdemeanor as may be prescribed by law” is disqualified for running for office, including mayor of a home rule city. KY. CONST. § 150.

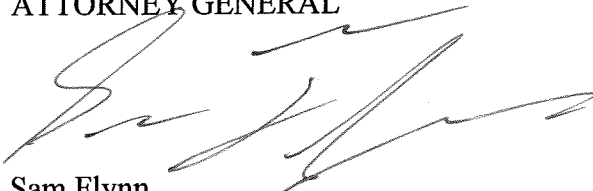
have long recognized Kentucky cities maintain significant legislative latitude, where the General Assembly has not spoken. *See e.g., Johnson v. Wilson*, 25 S.W. 1057 (Ky. 1894) (upholding a city charter fixing the terms of a city treasurer, because the legislature did not supersede it with a general law.); *see also, Parsons v. Breed*, 104 S.W. 759 (Ky. 1907).

Nor do other general election laws provide further guidance on successive term limits for mayoral elections that would indicate a paramount state concern. KRS 83A.050(1) states that "[e]lection[s] of city officers shall be governed by general election laws provided in KRS Chapters 116 through 121, unless the city legislative body prescribes by ordinance that election of city officers shall be nonpartisan city election laws as provided in KRS 83A.045, 83A.170, 83.175 and 83A.047..." *See also*, KRS 83A.050(2)-(3). Yet KRS Chapters 116 through 121 do not prescribe or proscribe term limits for mayors of the home rule class, but rather the manner in which elections are to be held, including voter registration, regulation of elections, conduct of elections, election contests, and campaign finance. Further, KRS 83A.045, 83A.170, and 83A.175 only prescribe rules for conducting nonpartisan elections for city offices. Like KRS 83A.040(1), these provisions, too, are silent as to term limits.

Finally, even if terms limits for the office of mayor in cities of the home rule class were partially covered by general law under KRS 83A.040(1), such term limits would not have any adverse effect on transient, non-citizens that would outweigh the benefit to the citizens of the enacting municipality. Transient, non-citizens of the municipality cannot vote in municipal elections, nor are they qualified to hold the office of mayor in home rule cities. *See* KRS 83A.040. Accordingly, no conflict exists between an ordinance setting term limits on the office of mayor in cities of the home rule class.

Therefore, this office does not find any constitutional or statutory impediment, preventing a city of the home rule class, other than a city formerly of the second class under KRS 83A.024, from enacting ordinances prescribing term limits for the office of mayor.

ANDY BESHEAR  
ATTORNEY GENERAL



Sam Flynn  
Assistant Attorney General